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SIPDIS

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SUBJECT: WIPO STANDING COMMITTEE ON THE LAW OF PATENTS (SCP) FAILS (AGAIN) TO ADOPT A WORK PLAN ON SUBSTANTIVE PATENT LAW HARMONIZATION; FATE OF HARMONIZATION AT WIPO IN DOUBT

SUMMARY

1. (U) The WIPO SCP met June 1 and 2, 2005, at WIPO Headquarters in Geneva to once again discuss proposals for moving work on substantive patent law harmonization forward. No agreement was reached, thus calling into question whether WIPO is the appropriate venue for achieving harmonization. END SUMMARY.

INTRODUCTION

2. (U) The WIPO SCP convened for its eleventh session on June 1 and 2, 2005, at WIPO Headquarters in Geneva. The meeting was chaired by Boris Simonov of the Russian Federation. Representing the Secretariat was WIPO Deputy Director General Francis Gurry, filling in for the curiously absent Director General, Dr. Kamil Idris. The central focus of the limited agenda for the meeting was the discussion of the future work of the SCP.

BACKGROUND

3. (U) Since its inception in 2000, the SCP has been meeting to discuss the technical details of a draft Substantive Patent Law Treaty (SPLT). Over the past two years, however, the discussions have deteriorated due to disputes between developing and developed countries over the best way to proceed with the discussions. The two competing schools of thought on this issue are represented by a group of developing countries led by Brazil, Argentina and India, who argue that the entire draft treaty as a whole must be considered to take account of the interests of all, and a group consisting of the United States, Japan and other developed country members of WIPO Group B, who believe the discussions should concentrate on a scaled-down first package of draft provisions related to four prior art issues*the definition of prior art, grace period, novelty and non-obviousness/inventive step.

4. (U) In an effort to reinvigorate the stalled patent law harmonization talks, the United States and Japan co-sponsored a proposal for the 2004 WIPO General Assembly meeting asking the General Assembly to adopt the &first package8 as the work plan for the SCP. The proposal noted the inefficiency of discussing the treaty as a whole, given the sharp divisions that had developed over certain issues, namely patentable subject matter and disclosure of traditional knowledge and genetic resources, and suggested that the work of the SCP should be refocused to a smaller set of issues that were ripe for near-term agreement. The proposal noted that harmonization of prior art standards would help reduce duplication of work by national offices, improve patent quality, and allow users to better predict the results of examination from office to office around the world. That proposal was rejected, mainly due to the efforts of a group, led by Brazil and Argentina, calling themselves the friends of development that argued the entirety of the draft treaty documents need to be discussed so that issues of importance to developing countries could be addressed, notwithstanding that many of these delegations had previously argued that the existing treaty documents would result in unacceptably broad harmonization. The General Assembly did, however, agree that the future date of the next SCP meeting would be determined on the basis of consultations the WIPO Director General may undertake.

5. (U) Pursuant to the General Assembly decision, the Director General convened an informal consultation in Casablanca, Morocco in February 2005. Although the various WIPO member state interests were represented at the Casablanca meeting, not all member states were invited. The meeting was chaired by India and presided over by the Director General. The meeting produced a proposed work plan to address the various concerns that had been impeding progress on harmonization. The proposal recommended that the SCP take up work on the &first package agenda, i.e., the four prior art issues, and that the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore should discuss issues related to genetic resources and sufficiency of the patent disclosure in parallel, accelerated processes in each body.

16. (U) This work plan was agreed to by all present except the delegate from Brazil. In various press releases and statements following the meeting, Brazil criticized the process as unfair, particularly noting that not all developing countries were represented. The criticism also eventually led India to back away from its chairman's support of the Casablanca proposal.

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17. (U) The Casablanca work plan was the central item on the June 2005 SCP agenda, along with a proposal from Brazil, Argentina, India and others, which argued that the SCP should continue discussing the draft SPLT as a whole, but also that the SPLT should include provisions on transfer of technology, anti-competitive practices, safeguarding of public interest flexibilities and specific clauses on principles and objectives.

18. (SBU) It was clear from the opening few interventions at the start of the meeting that the discussions would be difficult. Argentina led off with a statement from its ambassador, stating its commitment to cooperation & as may be necessary, but emphasizing its view that the Casablanca process was unbalanced and not representative of all views. (Note: The participation of Argentina's ambassador at the SCP, which is a specialized technical body of WIPO, is indicative of how politicized and how detached from its core technical mission the work of the SCP has become) Argentina continued by stating that the &developing8 countries were not demandeurs on the SPLT, but had participated constructively, and noted that the Casablanca proposal was unacceptable because it was too rigid with respect to TRIPS flexibilities. India, Brazil, Egypt and Chile supported the intervention by Argentina. (Note: India's ambassador led India's delegation on day one of the meeting, again illustrating the politicized nature of the discussions).

19. (U) Italy, on behalf of Group B, voiced support for the Casablanca approach, and was supported by Sudan, Morocco and a number of NGOs. Switzerland proposed that all six items identified in the Casablanca approach be developed in the respective bodies so that all six can be presented at once to a diplomatic conference at an appropriate time. This proposal, however, did not receive support. In addition, Pakistan proposed that before proceeding further on harmonization, the SCP should investigate its potential impact and suggested that the WIPO IB and UNCTAD produce a joint study of the effects of IPR standards on development. Australia supported the concept of an impact analysis, but noted that the SCP should maintain its focus on the law of patents, not the law of all things. India also supported the concept, but as part of the overall development agenda, not as part of the SCP discussions. The United States noted serious misgivings concerning transparency and inclusiveness of such a study and suggested that individual member states were better situated to make a decision on potential impact.

110. (U) The remainder of day one was devoted to different delegations, including NGOs, expressing different views on how to proceed. At the end of the day, the Chairman noted the divergent views, the various proposals put forward and suggested that the SCP should endeavor to provide a pragmatic recommendation for the General Assembly.

111. (U) Day two of the meeting was supposed to be a simple exercise in adopting the two-page draft Chairman's Summary, but quickly turned into a lengthy exercise in parsing language, led again by Brazil, Argentina and India. There were lengthy discourses on how five short paragraphs, which did not say a great deal to begin with, should be arranged so as not to give false or misleading impressions about one thing or another. The delegation of China, reflecting the growing anger and exasperation of many delegations in the room, finally intervened with a plea to either resolve the issue or have no summary at all. What should have taken, in terms of reasonable interventions and discourse, perhaps an hour to resolve ended up taking an entire day finally being resolved the next morning.

112. (SBU) The unnecessarily contentious Summary drafting exercise was illustrative of the apparent bad will and contentious nature that characterizes discussions in this committee. It does not appear that differences will be resolved soon. The United States has already initiated discussions with interested parties outside WIPO and plans to continue to pursue harmonization in that context to achieve progress. While these discussions are being undertaken with the hope, however small, of bringing work back to WIPO if circumstances change, all options should remain open.

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